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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

PP Docket No. 93-253

In re Matter of )  
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Implementation of Section 309(j) )  
of the Communications Act )  
Competitive Bidding )  
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To: The Commission

COMMENTS OF JAJ CELLULAR

JAJ Cellular ("JAJ"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its comments in response to the above-captioned Notice of Proposed Rulemaking ("NPRM"), PP Docket No. 93-253, FCC Document Number 93-455, released October 12, 1993, in which the Commission has requested comment on proposed rules relating to its utilization of competitive bidding procedures, pursuant to Section 309(j) of the Communications Act of 1934, as amended, for certain Commission authorizations.<sup>1/</sup>

Background

In April 1993, the U.S. Court of Appeals for the D.C. Circuit rendered its decision in McElroy Electronics Corporation v. FCC ("McElroy"),<sup>2/</sup> unanimously reversing the FCC's 1989 order which dismissed the unserved area cellular applications of JAJ, McElroy and Los Angeles SMSA Limited Partnership ("LASLP") in the Los

<sup>1/</sup> See Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993).

<sup>2/</sup> 990 F.2d 1351 (D.C. Cir. 1993).

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Angeles, Phoenix and Minneapolis-St. Paul markets as premature.<sup>3/</sup> The Court directed the FCC to take certain very specific actions on remand.<sup>4/</sup> Over six months have passed since the decision was issued and the Commission has taken no meaningful action to carry out the Court's directives.<sup>5/</sup> Moreover, in response to a recent status inquiry, the Commission has stated that:

These applications are currently in the hands of our Legal Branch. There are, however, numerous questions which must be answered before any action is forthcoming. Some of these questions are currently the subject of a recently adopted Notice of Proposed Rulemaking (NPRM). Since action is dependent upon this rulemaking process, there is no accurate way to predict a time-frame within which Commission action on the McElroy applications will be forthcoming.

Please be assured, however, that as soon as these policy questions have been answered, we

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<sup>3/</sup> A full recital of the facts and grounds upon which the applications were ordered to be reinstated can be found in the McElroy decision.

<sup>4/</sup> Specifically, the Commission's task was threefold:

- (1) reinstate nunc pro tunc the applications of McElroy, JAJ and LASLP filed in 1988 and 1989 to serve respective unserved portions of the Los Angeles, Minneapolis and Phoenix MSAs;
- (2) determine whether a fourth applicant, Price Communications Cellular, Inc., should also be reinstated; and
- (3) decide whether subsequently adopted rules should be applied retroactively to these reinstated applications, including rules relating to the appropriate licensing mechanism, comparative hearing or lottery.

<sup>5/</sup> The Commission has requested that the affected applicants resubmit their dismissed applications. See e.g., Letter from John Cimko, Chief Mobile Services Division, to Louis Gurman (May 20, 1993).

will take expeditious action to implement the court's decision.<sup>6/</sup>

The NPRM to which the Commission refers is the NPRM to which these comments relate.

With regard to unserved area applications, the NPRM states:

Approximately 10,000 unserved area applications were filed between March 10 and May 12, 1993; of these, approximately 9,000 mutually exclusive applications were filed for 83 systems. Given the large number of applications filed prior to July 26, 1993 and the criteria described in Section 309(j), the Commission has the option of allowing these unserved area applications to be resolved by auction rather than by lottery. See Special Section 6002(c) (Special Rule). We believe that auctions for these pending applications would meet the statutory objectives. . . . [W]e propose to auction, rather than lottery, unserved area applications filed prior to July 26, 1993.<sup>7/</sup>

Notwithstanding the Commission's questionable rationale for delay in its letter to Senator Kennedy, there is no mention whatsoever of the unserved area applications which were remanded in the McElroy decision. Thus, it is unclear whether those applications, which the Court found were timely filed in 1988, have been ignored or rendered invisible amidst the nearly 10,000 new applications (including more than 500 applications for Market 2B, Los Angeles,<sup>8/</sup> for which JAJ applied) which were just filed this year and subject to the McElroy appeal.<sup>9/</sup> JAJ submits that the Los

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<sup>6/</sup> See Letter from John Cimko, Jr., Chief Mobile Services Division, to Sen. Edward M. Kennedy (September 23, 1993).

<sup>7/</sup> Id. at ¶160.

<sup>8/</sup> Public Notice, Report No. CL-93-79 (April 14, 1993).

<sup>9/</sup> The applicants filed with full notice that their applications would be subject to the outcome of the McElroy appeal.  
(continued...)

Angeles, Phoenix and Minneapolis-St. Paul applications reinstated in the McElroy decision should not be included amongst those unserved area applications likely to be subject to competitive bidding. Neither the Commission's nor Congress' objectives for instituting competitive bidding, nor the provisions of the Budget Act warrant such action.

Subjecting the McElroy Reinstated Applications Would Be Contrary to the Stated Goals for Implementing Competitive Bidding

In the NPRM the Commission stated the objectives it must promote under Section 309(j), first and foremost of which is:

the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.<sup>10/</sup>

The Commission has proposed, however, to assign the timing of the cellular auctions a lower priority than the auctioning of spectrum for the new Personal Communications Service ("PCS").<sup>11/</sup> And while regulations relating to competitive bidding must be prescribed within 210 days after the date of enactment of the Act (March 10, 1994), except in the case of PCS, it could take up to five years of enactment to actually issue cellular licenses and permits pursuant to the competitive bidding process.

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<sup>2/</sup>(...continued)

Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 1363, 1364 (1993).

<sup>10/</sup> NPRM at ¶12(A).

<sup>11/</sup> Id. at ¶114.

Thus, the areas JAJ has sought to serve remain unserved and will continue to remain unserved for the indefinite future while the Commission conducts yet another rulemaking. This does not square with the Commission's stated goal of "the rapid deployment of new . . . services for the benefit of the public, including those living in rural areas" and the options available to it under the Budget Act to carry out this goal.<sup>12/</sup>

Separating the 1988 Los Angeles, Phoenix and Minneapolis-St. Paul applications from the thousands of applications recently filed would be consistent with the Court's remand order and would not in any way thwart the Commission's stated objectives of rapid delivery of service. The Budget Act expressly allows the Commission to continue to utilize lotteries for applications accepted for filing before July 26, 1993.<sup>13/</sup> The case for such equitable treatment is particularly compelling in the case of the 1988 remand applications. Further, the FCC proposes disparate treatment for Multichannel Multipoint Distribution Service ("MMDS") applications filed prior to July 26, 1993, without any meaningful justification

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<sup>12/</sup> Subjecting the reinstated applications to competitive bidding would also appear to be a violation of the McElroy remand in which the Court instructed the Commission to consider whether to apply those rules in place when the applications were filed or those adopted subsequent to the filing of the applications and in place on the date the Court issued its decision. The Commission may not avoid its responsibilities pursuant to the McElroy mandate by looking to a rulemaking, which operates only prospectively. See AT&T v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992) (Commission had an obligation to answer the questions raised by complaint and had no discretion to postpone deciding those questions through adoption of a rulemaking proceeding).

<sup>13/</sup> Section 6002(e) of the Budget Act.

for its proposed treatment of the cellular applicants. MMDS is "typically used to provide video entertainment programming . . .

.<sup>14/</sup> The Commission states:

We tentatively conclude that it would better serve the public interest to lottery the pre-July 26, 1993, MMDS applications rather than subject them to competitive bidding to avoid further delay in granting MDS licenses. Those applications already were subject to a freeze, and thus delayed. To auction those licenses would further delay delivery of MMDS service to the public because the auction rules will not be in effect for several months.<sup>15/</sup>

It is interesting to note that the Commission's MMDS freeze was only initiated on April 9, 1992.<sup>16/</sup> On the other hand, the Commission's freeze on the acceptance of unserved area cellular applications lasted from April 10, 1989 until March 10, 1993.<sup>17/</sup>

The markets at issue in the McElroy case should not be included in the competitive bidding process. To subject the applications to any further delay would be in direct contravention of the Court's mandate, the goals of the Budget Act and the public interest.

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<sup>14/</sup> NPRM at ¶150.

<sup>15/</sup> Id. at ¶151 (emphasis added).

<sup>16/</sup> Notice of Proposed Rulemaking, PR Docket No. 92-80, 7 FCC Rcd 3266 (1992).

<sup>17/</sup> See Cellular Applications for Unserved Areas in MSAs/NECMAs, 4 FCC Rcd 3636 (1989); Public Notice, Report No. CL-93-36 (released Dec. 23, 1992).

CONCLUSION

For the foregoing reasons, JAJ respectfully requests that the Commission exclude the applications of JAJ, McElroy and LASLP from the competitive bidding process and carry out the McElroy Court's directive.

Respectfully submitted,

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